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No. 02-1541

In the Supreme Court of the United States

STATE OF IOWA,
Petitioner

vs.

FELIPE EDGARDO TOVAR
Respondent.

ON WRIT OF CERTIORARI TO THE
IOWA SUPREME COURT

BRIEF OF THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE IOWA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant at a plea proceeding intelligently and knowingly waives his fundamental right to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, when the trial court fails to advise the defendant about the dangers and disadvantages of self-representation.

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INTERESTS OF *AMICI CURIAE*[1]

The NATIONAL LEGAL AID & DEFENDER ASSOCIATION (NLADA) is a private, non-profit membership organization founded in 1911 to promote the availability of quality legal services in civil and criminal cases to individuals who are unable to afford to retain private counsel. NLADA's membership spans all 50 states and the District of Columbia, situated in approximately 3,000 offices, including civil legal aid providers, public defender programs, at both the state and county level, statewide defender commissions, assigned counsel programs, contract defender programs, state and local defender associations, law school criminal clinics, and death penalty trial and post convictionprograms. NLADA provides training, technical assistance, internet information resources, standards, periodicals and other publications, and amicus curiae participation in appropriate cases affecting the rights of poor and low income peopleseeking equal access to justice.

The ILLINOIS ASSOCATION OF CRIMINAL DEFENSE LAWYERS (IACDL) is the only statewide organization for criminal defense lawyers in Illinois that represents both the public and private sectors of the criminal defense bar. It is a not-for-profit organization that retains complete independence from outside funding sources by being supported solely by its members. Its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence,

[1] The parties have consented to the filing of this brief. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. *Amici curiae* also note that one of the contributors to this brief, Emily Hughes, represented Felipe Tovar in this matter in the district court when she was an assistant public defender in Johnson County, Iowa.

and expertise of lawyers in the field of criminal defense. Its purpose is to improve the quality of representation to the citizen accused and to assist its members by providing resources via committees, continuing education seminars, and current legislative actions. By presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs, the IACDL seeks to improve the criminal justice system in Illinois.

The IOWA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (IACDL) is the only statewide organization for criminal defense lawyers in Iowa that represents both the public and private sectors of the criminal defense bar. An independent, not-for-profit organization, its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence, and expertise of lawyers in the field of criminal defense. It informs members by providing resources via committees and continuing education seminars. The Iowa Association of Criminal Defense Lawyers also advocates on behalf of the improvement of the criminal justice system by presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs.

The NLADA, the Illinois Association of Criminal Defense Lawyers, the Iowa Association of Criminal Defense Lawyers, and their members have a compelling interest in the outcome of this case because this Court's decision affirming the Iowa Supreme Court will protect the fundamental right to counsel for all persons facing misdemeanor and felony offenses.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief, with the exception that *amici* take issue with any characterization in petitioner's brief or in petitioner's *amici's* briefs that

Felipe Tovar was not indigent when he pled guilty to Operating While Intoxicated in Story County, Iowa.

SUMMARY OF ARGUMENT

This Court should affirm the Iowa Supreme Court's decision because it protects the fundamental right to counsel under the Sixth Amendment to the United States Constitution. Because this Court indulges every reasonable presumption against the waiver of a fundamental right, the question of whether Felipe Tovar knowingly and intelligently waived his fundamental right to counsel must be approached with extreme caution—especially because he was never advised that he had a right to counsel in his plea hearing, much less warned of the dangers and disadvantages of proceeding without counsel.

In order to ensure that misdemeanor defendants who plead guilty are not subjected to assembly-line justice, this Court should affirm the decision of the Iowa Supreme Court so that all persons pleading guilty to a crime without the aid of counsel are made aware of the dangers and disadvantages of self-representation.

Amici offer the Court comprehensive judicial authority favoring a reading of the Sixth Amendment to militate in favor of a court providing a defendant with advice about the role of counsel in a plea proceeding and the risk of going forward without counsel before accepting a plea. The eighteen states and six federal circuits that have addressed the issue of waiver of counsel at a plea proceeding either require or strongly advise a trial court to admonish a defendant about the dangers of self-representation. Ten states which have addressed this issue in the context of plea proceedings do not

require a defendant to be warned of the dangers of self-representation. No federal circuits have taken this approach. The remaining states and federal circuits have not addressed the issue of waiver of counsel in the context of a plea proceeding, although many have addressed it in the context of trial. Clearly the best practice is to make all persons charged with misdemeanors or felonies aware of the risks of waiving counsel.

Because of the importance of ensuring that a defendant who waives counsel does so with his "eyes open," this Court should require that a defendant be fully apprised of the consequences of participating in a plea hearing without the assistance of counsel.

ARGUMENT

When Felipe Tovar pled guilty to Operating While Intoxicated in Story County, Iowa, he was twenty-one years old, J.A. at 12,[2] and had no prior criminal record. J.A. at 52-53. His plea hearing amounted to a mini "cattle call" wherein five defendants pled guilty to unrelated and different misdemeanor offenses at the same time. J.A. at 6-42.

Although the trial judge advised Tovar about his right to an attorney should he choose to go to trial, J.A. at 16, the trial judge failed to advise Tovar about his right to an attorney at

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[2] *Amici curiae* use the following abbreviations: "Pet. Cert." refers to State's Petition for Certiorari; "Pet. App." refers to Appendix to Petition for Certiorari; "Pet. Br." and "Pet. Br. App." refer to the brief and appendix filed by the Petitioner; "J.A." refers to Joint Appendix; "States of Colorado, et al. Amicus Br." and "States of Colorado, et al. Amicus Br. App" refer to the brief and appendix filed on behalf of the various States' Attorneys General; "U.S. Amicus Br." refers to the brief submitted by the Solicitor General.

a plea hearing. *See id.* Because the trial judge failed to safeguard Felipe Tovar's fundamental right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution by failing to provide him with information sufficient to permit him to meaningfully consider the consequence of his participating in a plea hearing without counsel, Tovar's waiver of counsel was not knowing and voluntary and cannot be used to enhance his subsequent Operating While Intoxicated charge to a felony offense.

The right to counsel is a fundamental constitutional right under the United States Constitution. U.S. CONST. AMEND. VI; *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). This fundamental right to counsel extends to plea proceedings. *Boyd v. Dutton*, 405 U.S. 1, 2 (1972). A defendant's waiver of this right, as any fundamental right, must be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In addition, a trial court must carefully scrutinize the propriety of such a waiver. *Id.*

The government has an interest in both punishing and deterring recidivism. *Ewing v. California*, 538 U.S. 11, ___, 123 S. Ct. 1179, 1181 (2003). At the same time, "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Because "[t]here is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice,'" *id.* at 36, this Court ensures that any person pleading guilty to crimes without the aid of counsel is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975),

quot-ing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

The decision to plead guilty frequently involves the making of difficult judgments. *McMann v. Richardson*, 397 U.S. 759, 769 (1970). Because many seemingly simple misdemeanor charges can become serious felonies if the offender becomes a recidivist, pleading guilty to a misdemeanor charge may be more complex than it first appears. It cannot reasonably be argued that Felipe Tovar knowingly and intelligently waived his fundamental right to counsel where he was never advised that he had any such right at his plea hearing, much less warned of the dangers and disadvantages of proceeding without counsel. *See, e.g., Nichols v. United States*, 511 U.S. 738, 748 (1994), *Lockyer v. Andrade*, 538 U.S. 63 (2003).

Amici offer the Court comprehensive judicial authority favoring a reading of the Sixth Amendment to militate in favor of a court providing a defendant with advice about the role of counsel in a plea proceeding and the risk of going forward without counsel before accepting a plea. The eighteen states and six federal circuits that have addressed the issue of waiver of counsel at a plea proceeding either require or strongly advise a trial court to admonish a defendant about the dangers of self-representation in the context of a plea proceeding. Only ten states (and no federal circuits) which have addressed this issue in the context of plea proceedings do not require a defendant to be warned of the dangers of self-repre-sentation, while the remaining states and federal circuits have not addressed the issue at a plea proceeding. Although not all jurisdictions have addressed the issue, a growing number of state and federal judicial authorities

recognize that this approach is not optional, but essential to compliance with the Sixth Amendment. The interpretation of these courts is in accord with *amici*'s view of the Sixth Amendment, our organizations' missions, and the NLADA's involvement in the 40th Anniversary campaign to realize the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). At the very least, a "best practices" approach dictates that the admonishments must be provided and a truly knowing and voluntary waiver obtained if the plea is to stand.

Because of the importance of ensuring that a defendant who waives counsel does so with his "'eyes open,'" *Faretta*, 422 U.S. at 835, *quoting Adams*, 317 U.S. at 279, this Court should require that a defendant be fully apprised of the consequences of participating in a plea hearing without the assistance of counsel.

I. MANY STATES AND FEDERAL CIRCUITS EITHER REQUIRE OR STRONGLY ADVISE TRIAL COURTS TO ADMONISH A DEFENDANT ABOUT THE DANGERS OF SELF-REPRESENTATION.

The Iowa Supreme Court's decision regarding the knowing, voluntary and intelligent waiver of the Sixth Amendment right to counsel is in harmony with decisions in many other states and federal circuits. Certain states and federal circuits—including the Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits, as well as Alaska, Arkansas, Connecticut, Florida, Missouri, New York, Ohio, Pennsylvania, and Wisconsin—require the trial court to admonish a defendant who wishes to proceed *pro se* at a plea

hearing about the dangers of self-representation. Other states and federal circuits—including the Second Circuit, California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, and Vermont—strongly advise trial courts to warn a defendant about the dangers of self-representation and employ a totality of the circumstances analysis when reviewing whether a waiver of counsel was knowing and voluntary.

A. Many States and Federal Circuits Require a Waiver of Counsel Colloquy that Follows the Guidance of *Faretta* or Warns about the Dangers of Self-Representation if a Defendant Chooses to Proceed *Pro Se* at a Plea Hearing.

1. Federal Circuits

As the Iowa Supreme Court correctly observed, Pet. App. at 16-17, the Ninth Circuit requires that a defendant be "made aware of the dangers and disadvantages of self-representation" before being allowed to plead guilty. *United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002) (quoting *Faretta*, 422 U.S. at 835). If the record does not reveal a colloquy between the defendant and the magistrate, the reviewing court will consider the background of the defendant, as well as anything in the record which may show that the defendant understood the disadvantages of representing himself. Most importantly, the Ninth Circuit applies this standard of warning to misdemeanor proceedings, noting that the legal system is no less complex for a defendant facing a misdemeanor. *Id.* at 1148 (citing *Argersinger*, 407 U.S. at 34). Contrary to the State's assertion that the Ninth Circuit's decision is a minority position, Pet. Cert. 17, other federal circuits—including the Fifth, Sixth, Eighth and the District of Columbia—also require a trial court to warn a

defendant wishing to proceed *pro se* at a guilty plea hearing about the dangers of self-representation.

The Eighth Circuit requires trial courts to warn defendants of the dangers of proceeding *pro se*. *Shafer v. Bowersox*, 329 F.3d 637, 647-48 (8th Cir. 2003). In *Shafer*, the Eighth Circuit reasoned that—even in a guilty plea proceeding—a waiver-of-counsel colloquy should include a "penetrating and comprehensive examination of all the circumstances under which a plea is tendered," *id.* at 647, *citing Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), and an awareness "of the dangers and disadvantages of self-representation so that his 'choice is made with eyes open.'" *Id.* at 648

Similarly, a defendant in the Fifth Circuit cannot proceed *pro se* in a misdemeanor plea proceeding without first discussing with the trial court the advantages of legal representation. *United States v. Davis*, 269 F.3d 514, 518-19 (5th Cir. 2001).

The Sixth Circuit has followed the lead of the District of Columbia Circuit by invoking its supervisory powers to specify the procedure that all federal district judges in its circuit must follow "in situations where an accused seeks to waive representation by counsel and proceed *pro se*." *United States v. McDowell*, 814 F.2d 245, 249-51 (6th Cir. 1987), *cert. denied* 484 U.S. 980 (1987) (citing *United States v. Bailey*, 675 F.2d 1292, 1297 (D.C. Cir. 1982), *cert. denied* 459 U.S. 853 (1982), and adopting the model inquiry from 1 *Bench Book for United States District Judges* 1.02-2 (3d ed. 1986)). Although the case in which the Sixth Circuit announced its rule was in the context of a *pro se* defendant at trial, and not in the context of a plea proceeding, the Sixth Circuit used its supervisory power to require future district court judges to cover the same substantive points as in the district judge benchbook, along with an express finding that the accused

has made a knowing and voluntary waiver "whenever . . . an accused . . . wishes to represent himself in criminal proceedings." *McDowell*, 675 F.2d at 250.

2. States

Alaska mandates a detailed colloquy before a defendant's waiver of the right to counsel can be deemed valid. *Swenson v. Municipality of Anchorage*, 616 P.2d 874, 878 (Alaska 1980). In *Swenson*, the defendant sought to withdraw his guilty plea for operating a motor vehicle while under the influence of intoxicants ("OMVI"). *Id.* at 876-877. He argued that his uncounseled guilty plea was invalid because the trial court failed to secure a knowing and intelligent waiver of counsel. *Id.* at 877. The Supreme Court of Alaska agreed, holding that a waiver of counsel cannot be valid without a detailed explanation of the benefits of counsel. *Id.* at 877-78.

Arkansas also requires the trial court to at least apprise the defendant of the dangers of self-representation before he or she can waive the right to counsel at a guilty plea proceeding. *King v. State*, 804 S.W.2d 360, 362 (Ark. 1991).

In Connecticut, the court must make the defendant aware of the dangers of self-representation before allowing the defendant to waive his right to counsel for a guilty plea. *See State v. Smith*, 558 A.2d 257 (Conn. App. 1989). Although *Smith* was decided in the context of a probation revocation proceeding, the reach of the opinion extends to waiver of counsel at any criminal proceeding. *Id.* at 260.

The Supreme Court of Florida requires a *Faretta* inquiry at each stage of the criminal process—regardless of whether the defendant is pleading guilty or proceeding to trial. FLA. R. CRIM. P. 3.111(d). *See Clary v. State*, 818 So.2d 686 (Fla. Dist. Ct. App. 2002). In fact, a trial court's failure to conduct a *Faretta* inquiry is *per se* reversible error that is not subject

to harmless error analysis. *Id.*[3]

The Missouri Supreme Court has recently been advised, through the Eighth Circuit's decision in *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003) (discussed *supra*), that the limited exchange it had approved for waiver of counsel in plea proceedings was not a reasonable application of clearly established federal law because it "did not advise [the defendant] of specific dangers or limitations related to self representation." *Shafer*, 329 F.3d at 648. The recently clarified standard in Missouri is thus the hybrid *Faretta-Von Moltke* colloquy delineated by the Eighth Circuit. *See supra* I(A)(1).

The New York Court of Appeals has long held that—even in an arraignment or plea proceeding—a trial court may not accept a defendant's waiver of counsel until it has engaged in a sufficiently searching inquiry that assures that the defendant appreciated the dangers and disadvantages of waiver. *People v. White*, 436 N.E.2d 507, 511 (N.Y. 1982)

Ohio courts will not find a knowing and intelligent waiver of counsel if the trial court "failed to thoroughly investigate whether [the defendant] had an understanding of the entire matter and an awareness of the hazards of representing himself." *State v. Obermeyer*, 787 N.E.2d 729, 731 (Ohio Ct.

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[3] Petitioner references Florida law to support its argument that a guilty plea colloquy is sufficient to warn a defendant of the consequences of self-representation at a plea proceeding. Pet. Brief at 24 (citing FLA. R. CRIM. P. 3.172 for that proposition that a separate waiver colloquy is unnecessary when the trial court secures a factual basis before accepting the defendant's guilty plea). In Florida, however, the inquiries made during a guilty plea will not suffice to establish a knowing, intelligent and voluntary waiver of counsel. *See Clary v. State*, 818 So.2d 686, 688 (Fla. Dist. Ct. App. 2002). On the contrary, the Supreme Court of Florida mandates *both colloquies* when a defendant seeks to plead guilty without counsel. *Compare* FLA. R. CRIM. P. 3.111(d) with FLA. R. CRIM. P. 3.172.

App. 2003). In finding that the defendant did not knowingly, intelligently, and voluntarily waive his right to counsel, the appellate court observed that for a "waiver to pass constitutional muster, the defendant must have 'some sense of the magnitude of the undertaking and hazards inherent in self-representation.'" *Id. at* 731 .

Pennsylvania has a procedural rule which directs trial courts to warn defendants of the risks of proceeding without counsel before accepting a waiver of counsel. *See* PA.R.CRIM. 121. In *Commonwealth v. Payson*, 723 A.2d 695 (Pa. Super. Ct. 1998), the appellate court invalidated the defendant's uncounseled guilty plea due to the insufficiency of defendant's waiver of counsel and adopted the extensive, six-point *Faretta*-style colloquy proposed in the comment to Rule 121. *Id.* at 700, 704. Because the trial court failed to conduct the requisite colloquy, the defendant had not knowingly and voluntarily waived his right to counsel. *Id.* at 704. *See also Commonwealth v. McDonough*, 812 A.2d 504, 506-507 (Pa. 2002).

Wisconsin also affirmatively requires a detailed waiver inquiry. *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997). In *Klessig*, the Supreme Court of Wisconsin instructed trial courts to conduct a colloquy to make certain that the defendant: (1) made a deliberate choice to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges against him; and (4) was aware of the general range of penalties that could have been imposed on him. *Id.* at 721 (overruling its earlier decision in *Pickens v. State*, 292 N.W.2d 601 (Wis. 1980), under which a colloquy was preferred but not required). The *Klessig* court held that when the circuit court fails to conduct the four-factor colloquy, reviewing courts must remand the case to an evidentiary hearing

to determine whether the defendant's waiver was knowing, intelligent, and voluntary.

B. Other States and Federal Circuits Prefer Trial Courts to Warn Defendants Who Wish to Proceed *Pro Se* at a Plea Hearing About the Dangers of Self-Representation.

In addition to jurisdictions which explicitly direct trial courts to discuss with the defendant the dangers of self-representation, other jurisdictions—including the Second Circuit, California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, and Vermont—have expressed a preference for such a discussion. In these jurisdictions, while trial courts are urged to conduct a meaningful inquiry, a failure to do so will not result in reversal if there is an objective indication that the defendant was aware of the dangers of self-representation.

1. Federal Circuit

According to the Second Circuit, *Faretta* does not mandate explicit warnings of the dangers and disadvantages of self-representation. *Dallio v. Spitzer,* 343 F. 3d 553, 561-62 (2d Cir. 2003). Although the Second Circuit acknowledges that *Faretta* instructs that a defendant "should be made aware of the dangers and disadvantages of self-representation," the Second Circuit views that statement as more of a "strong admonition than...a legal mandate." *Id* at 562-63 (rejecting "rigid waiver formulas or scripted procedures" and instead applying a totality of the circumstances analysis in evaluating waiver of counsel at a pre-trial suppression hearing). Despite its position that the *Faretta* warning about the dangers of self-representation is dictum, *id.* at 621, the Second Circuit has "strongly endorsed *Faretta* warnings as a factor important to the knowing and intelligent waiver of counsel." *Id.* at 563.

After explaining that its decision was narrowly focused on examining whether a state court's ruling fell within the scope of 28 U.S.C. § 2254(d), the Second Circuit noted that the cautionary approach of requiring *Faretta* warnings as a minimum requirement would be "understandable, even laudable, were a district court itself addressing a criminal defendant intent on proceeding *pro se*." *Id.* at 564. This observation suggests that the Second Circuit prefers *Faretta* warnings in the context of a plea proceeding, although it does not require them.

2. States

Minnesota trial courts will not accept an uncounseled guilty plea unless the trial court has made a "penetrating and comprehensive examination of the defendant" to assure—at the very least—that the defendant has a full knowledge and understanding of his or her rights. *State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987) (citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948), and MINN.R.CRIM.P. 5.02). The Supreme Court of Minnesota has even gone so far as to strongly urge trial courts to require a defendant to discuss the consequences of waiver with an attorney before accepting the waiver. *Burt v. State*, 256 N.W.2d 633, 635 (Minn. 1977).

Although preferring a *Faretta*-type colloquy, the Nebraska Supreme Court observes that, at a minimum, a knowing and intelligent waiver of counsel at a guilty plea hearing should ensure that "the accused [is] made sufficiently aware of the right to have counsel present and of the possible consequences of a decision to forego counsel." *State v. Dunster*, 631 N.W.2d 879, 898 (Neb. 2001), *cert. denied* 535 U.S. 908 (2002). In *Dunster*, a capital defendant waived counsel at his capital guilty plea and sentencing hearings. *Id.* at 889-893. Before accepting the waiver, the trial court not only warned defendant Dunster about the consequences of proceeding *pro se*, but also appointed another attorney to

advise him about the ramifications of proceeding *pro se*. *Id.* at 889-891. In finding Dunster's waiver knowing and voluntary, the Nebraska Supreme Court highlighted that a "trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that warning is not required." *Id.*; *compare State v. Werner*, 600 N.W.2d 500, 507 (Neb. App. Ct. 1999) (signed, standard waiver forms, which inform defendants of their right to counsel, are sufficient to show defendant "knowingly, intelligently, and voluntarily, waived her right to counsel").

Other states that prefer but do not require a defendant to be specifically warned of the dangers of self-representation include: *Benge v. Superior Court*, 167 Cal. Rptr. 714 (Cal. Ct. App. 1980); *State v. Merino*, 915 P.2d 672, 695-96 (Haw. 1996); and *Shelton v. State*, 390 N.E.2d 1048, 1051 (Ind. App. 1979); *compare Redington v. State*, 678 N.E.2d 114, 118-120 (Ind. 1997) (clarifying that admonishments "regarding the dangers of self-representation at trial . . . are inapplicable" in the context of a plea proceeding because "a trial court is not required to engage in superfluous warnings which have no bearing to the proceeding at hand," but not disturbing *Shelton*'s observations regarding the importance of counsel in the context of plea proceedings).

In *State v. Fulp*, 558 S.E.2d 156, 159 (N.C. 1999), the Supreme Court of North Carolina relied on its state statute to discuss what constitutes a voluntary waiver of counsel for the purposes of entering a plea. *Id.* at 159 (citing N.C.G.S. § 15A-1242 (1999)). One of the requirements is that the trial judge must make "thorough inquiry" and be "satisfied" that the defendant "[u]nderstands and appreciates the consequences of this decision." § 15A-1242(2). The *Fulp* court conducted a totality of the circumstances analysis to conclude that the defendant knowingly, voluntarily, and intelligently

waived his right to counsel. *Id.* at 159. In so doing, the court also noted that *Fulp* had signed a written waiver form. *Id.* at 161-62.

The Supreme Court of South Carolina encourages *Faretta* inquiries without directly mandating their use each time the accused purports to waive the right to counsel. *Prince v. State*, 392 S.E.2d 462 (S.C. 1990) (citing *Faretta v. California*, 422 U.S. 806 (1975)). In *Watts v. State*, 556 S.E.2d 368 (S.C. 2001), South Carolina found a plea of guilty invalid when: (1) the trial judge failed to address the disadvantages of appearing *pro se*; and (2) the record was devoid of any indication that the accused could make an intelligent waiver without proper *Faretta* warnings. *Watts*, 566 S.E.2d at 370-371.

Tennessee courts have also stressed the importance of warning a defendant who wishes to proceed *pro se* at a guilty plea about the dangers of self-representation. *Smith v. Tennessee*, 987 S.W.2d 871 (Tenn. Crim. App. 1998). In *Smith*, the Tennessee Court of Criminal Appeals noted that "failure to warn of the specific dangers of self-representation is the area of primary concern" when dealing with waivers of counsel. *Id.* at 877. The court invalidated the defendant's purported waiver, holding that even when the defendant appears to have prior experience with the criminal justice system, the trial court should establish a record indicating that the defendant was aware of the dangers of proceeding *pro se*. *Id.* at 877.

Vermont—before accepting a defendant's waiver of counsel at a plea proceeding—instructs that trial courts should first "conduct sufficient inquiry into the defendant's experience, motives, and understanding of what he is undertaking to determine the quality of his purported waiver' and then 'provide a clear explanation of the adverse consequences

of *pro se* representation." *State v. Pollard*, 657 A.2d 185, 190-91 (Vt. 1995).

II. SOME JURISDICTIONS DO NOT ADVISE TRIAL COURTS TO WARN DEFENDANTS OF THE DANGERS OF SELF-REPRESENTATION IN PLEA PROCEEDINGS, WHILE OTHERS HAVE NOT EXPLAINED WHAT A TRIAL COURT SHOULD ADVISE A DEFENDANT WHO WISHES TO PROCEED *PRO SE* AT A PLEA HEARING.

Although eighteen states and six federal circuits either require or strongly prefer the trial court to warn a defendant wishing to proceed *pro se* at a guilty plea hearing about the dangers of self-representation, ten states (and no federal jurisdictions) neither require nor advise such a colloquy in plea proceedings. These state jurisdictions reflect a minority viewpoint that the Iowa Supreme Court chose not to follow. The remaining states and federal jurisdictions have not explained what a trial court should advise a defendant who wishes to proceed *pro se* at a plea hearing.

A. A Smaller Number of States Do Not Specifically Advise a Trial Court to Warn a Defendant about the Dangers of Self-Representation in a Plea Proceeding.

Of the federal circuits which have examined the requirements of waiver of counsel in the context of a plea proceeding, all have at least advised the federal district court to warn of the dangers of self-representation. *See supra*, Section I(A) and (B). The ten states that have addressed the issue of what constitutes a knowing waiver of counsel in the context of a guilty plea proceeding—Arizona, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, South Dakota, West Virginia, and Texas—neither require nor advise a trial court to warn a

defendant about the dangers of self-representation. Some of these states do not mandate the *Faretta* warning in a plea proceeding because they are not convinced that a plea hearing is sufficiently complex to warrant such an admonishment.

For example, while Idaho adheres to *Faretta* warnings and mandates that a defendant wishing to proceed *pro se* at trial should be made aware of the dangers and disadvantages of representing himself, *State v. Maxey,* 873 P.2d 150, 153 (Idaho 1994), it contrasts these warnings with the admonitions necessary for a *pro se* plea hearing. *Id.* at 154. In the context of a plea hearing, Idaho courts are "not convinced . . . that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel." *Id.* at 154. Similarly, South Dakota does not require "advisement on the dangers of self-representation" before "waiver of the right to counsel" may be accepted and does not believe that the *Faretta* inquiries apply to waiver of counsel at a plea. *State v. Cashman,* 491 N.W.2d 462, 463 (S.D. 1992), *cert. denied* 507 U.S. 966 (1993). In so holding, the court stated it was "obvious that Cashman had to know 'what a lawyer could do for him . . .' during the entry of his plea, namely: advise him not to plead guilty."[4] *Id.* at 465-66 (internal citations and quotations omitted).

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[4] The Iowa Supreme Court examined the argument about the relative unimportance of counsel at a plea hearing and found such a conclusion "overly simplistic." J.A. at 15. The Iowa Supreme Court instead safeguarded the fundamental right to counsel by requiring a more detailed admonishment, acknowledging that an attorney's role in a plea proceeding goes well beyond merely advising a defendant not to plead guilty: it is "multi-faceted" and not "one-dimensional." J.A. at 15.

Other states that do not specifically require warnings of the dangers of self-representation nonetheless follow the principle that the waiver colloquy must be distinct from the plea colloquy. For example, the Michigan Court of Appeals has specified that a "mere recitation of rights followed by a plea of guilty does not constitute an express waiver." *People v. Gonzales,* 446 N.W.2d 296, 298 (Mich. Ct. App. 1989).

For Illinois, the State cites *People v. Christensen,* 555 N.E.2d 422 (Ill. App. Ct. 1990) for the principle that "waiver [is valid when] defendant receive[s] [a] valid guilty plea colloquy, including advisory charges, punishments, and right to counsel." Pet. Br. App. at 5. In finding that the defendant's plea was intelligent and voluntary, however, the *Christensen* court noted that at the hearing, the defendant questioned the court several times about her right to an attorney and the court even took a "recess so that the assistant State's Attorney could speak to defendant about obtaining an attorney." *Id.* at 424. Thus, even though one Illinois appellate court seems to have required a minimal waiver of counsel colloquy that does not include specific warnings about the dangers of self-representation, in the context of *Christensen* it is unclear what the defendant was actually told. *Also compare People v. Lego,* 660 N.E.2d 971, 973 (Ill. 1995) (in the context of reviewing waiver of *pro se* defendant at trial, the Illinois Supreme Court stated: "Although a defendant need not possess the skill and experience of a lawyer in order to choose self-representation competently and intelligently, he should be made aware of the dangers and disadvantages of self-representation . . . . This requirement of knowing and intelligent choice calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.").

Other states that have adopted lax standards when recon-

ciling the fundamental right to counsel with the equally fundamental right of self-representation include Louisiana and Texas. The Louisiana Supreme Court does not require any sort of colloquy between the trial judge and the defendant. *State v. Stevison*, 721 So.2d 843 (La. 1998). Similarly, Texas does not require a *Faretta*-type admonishment of the "dangers and disadvantages" of waiving counsel when a misdemeanor defendant is not contesting guilt. *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002). *See also State v. Natoli*, 764 P.2d 10, 11-12 (Ariz. 1988); *State v. Wolfe*, 75 P.3d 1271, 1272-73 (Mont. 2003)

Finally, in a pre-*Faretta* case, the Nevada Supreme Court held that in plea hearings, a defendant's waiver of counsel is valid if it is "made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Garnick v. Miller*, 403 P.2d 850, 853 (Nev. 1965). Nevada acknowledges, however, that there is a "strong presumption against waiver of the constitutional right to counsel," *id.* at 853, and consequently "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." *Id.* The Nevada court has not expressly changed this position post-*Faretta*. *See, e.g.*, *Beals v. Nevada*, 802 P.2d 2 (Nev. 1990) (defendant's waiver of counsel at sentencing invalid) (citing *Garnick* and *Von Moltke*). *See also State v. McCraine*, 588 S.E.2d 177, 179 (W.Va. 2003) and *State v. Armstrong*, 332 S.E.2d 837, 842 (W.Va. 1985) (completion of a written waiver form is prima facie evidence of waiver of the right to counsel, although completion of the form is not conclusive proof of knowing and intelligent waiver).

B. The Remaining States and Federal Circuits Have Not Specified What the Trial Court's Inquiry Should Include When a Defendant Wishes to Proceed *Pro Se* at a Plea Hearing, Although Most Have Specified What the Inquiry Should Include for a *Pro Se* Defendant atTrial.

1. Federal Circuits

The remaining federal circuits—the First, Third, Fourth, Seventh, Tenth, and Eleventh—have not specified what a trial court should ask a defendant who wishes to proceed *pro se* at a plea hearing post-*Faretta*, although they have examined the issue in the context of a defendant who wishes to proceed *pro se* at trial.

In the context of a defendant requesting to proceed *pro se* at trial, the First Circuit has delineated the following waiver requirements:

> What is required, we think, is a sense of the magnitude of the undertaking and the "disadvantages of self-representation," an awareness that there are technical rules governing the conduct of a trial, and that presenting a defense is not a simple matter of telling one's story. . . .We repeat, however, that the defendant's knowledge of these relevant facts need not appear on the record at trial. The district court may properly consider, in addition to [the defendant's] background, experience and conduct, such factors as his involvement in previous criminal trials, his representation by counsel before trial, and the continued presence of advisory counsel at trial in determining whether he knew what he was getting into.

United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989), *citing, inter alia*, *Maynard v. Meachum*, 545 F.2d 273, 279 (1st Cir. 1976) and *Faretta*, 422 U.S. at 835 (internal citations omitted). While mandating that the defendant have "a sense of the magnitude of the undertaking and the 'disa-

vantages of self-representation,'" *id.*, *citing Faretta*, 422 U.S. at 846, the First Circuit "'has not interpreted these decisions to mean that the district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed *pro se*.'" *Id.* at 845, *citing United States v. Hafen*, 726 F.2d 21, 25 (1st Cir. 1984), *cert. denied* 466 U.S. 962 (1984). Thus, while the First Circuit has not expressly addressed this issue in the context of waiver of counsel at plea proceeding, in the context of a waiver of counsel at trial, the First Circuit mandates that the defendant have a sense of the disadvantages of self-representation. *Id.* While it believes such "on the record findings are almost always wise, they are not mandated." *Id.* at 845.

The Third Circuit has also not addressed the waiver of counsel issue in the context of a plea proceeding, although it has addressed it in other contexts. In *United States v. Welty*, 674 F.2d 185 (3rd Cir. 1982), after a defendant represented himself for the first two days of trial, the judge refused the defendant's request that an attorney take over his case and finish the trial. *Id.* at 186-87. In examining what a trial judge should discuss with a defendant wishing to proceed *pro se* at trial, *Welty* observed that the court "has the responsibility of ensuring that any choice of self-representation is made knowingly and intelligently, with an awareness of the dangers and disadvantages inherent in defending oneself." *Id.* at 188. In *United States v. Salemo*, 61 F.3d 214 (3rd Cir. 1995), *cert. denied* 516 U.S. 1001 (1995), which involved a defendant representing himself at a sentencing hearing, the Third Circuit examined what a trial court should tell a defendant wishing to proceed *pro se* at sentencing. *Id.* at 219. The court emphasized that "the inquiry at sentencing need only be tailored to that proceeding and the consequences that may flow from it." *Id.* at 219. While acknowledging that "it need not be as exhaustive and searching as a similar inquiry before the conclusion of trial," *id.* at 219, the Third Circuit nonetheless

required that the "court's inquiry must be calculated to insure that the defendant is 'made aware of the dangers and disadvantages of self-representation, so that the record will establish that he[/she] knows what he[/she] is doing and [the] choice is made with eyes open.'" *Id.* at 220, *citing Faretta*, 422 U.S. at 834. Whether the Third Circuit would require the same standard in the context of a plea proceeding remains an open question.

The Fourth Circuit has examined what constitutes a knowing and voluntary waiver of counsel in the context of a pre-*Faretta* plea proceeding. *Aiken v. United States*, 296 F.2d 604 (4th Cir. 1961). At that time, the Fourth Circuit held that a lower court was required to "(1) explain the charges and the possible punishment; (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to [the defendant] by the investigating or prosecuting officials." *Id.* at 607. While the Fourth Circuit has not expressly modified *Aiken* in light of *Faretta*, it has addressed waiver of counsel issues in the context of trial. In *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988), *cert. denied* 487 U.S. 1211 (1988), the court discussed *Aiken* in the context of the denial of a request for substitution of counsel at trial resulting in the defendant proceeding *pro se* and noted the importance of the defendant's understanding of the dangers and disadvantages of self-representation. *Id.* at 110. In *United States v. Singleton*, 107 F.3d 1091 (4th Cir. 1997), *cert. denied* 522 U.S. 825 (1997), a defendant waived counsel in the course of trial, although his previous counsel remained in the courtroom and spoke with him during some breaks. *Id.* at 1094-95. The court "affirmed open court exploration of the defendant's background capabilities and understanding of the dangers and disadvantages of self-representation but refused to treat the failure to conduct a formal inquiry as *per se* reversible error." *Id.* at 1097-98 (citing *Gallop*, 838 F.2d at 110). Whether the Fourth Circuit would

apply this same standard in the context of waiver of counsel at plea proceedings remains undecided.

It is equally unclear what safeguards the Seventh Circuit would impose to protect the fundamental right to counsel in guilty plea proceedings. In *Day v. United States*, 357 F.2d 907 (7th Cir. 1966), the Seventh Circuit relied on *Von Moltke* to determine the sufficiency of the defendant's waiver of counsel upon entering his guilty plea. The court found that "the fact that the petitioner stated flatly that he did not want counsel should not have foreclosed all further inquiry" and remanded for a hearing to determine the extent of the defendant's awareness and understanding. *Id.* at 910-11. *Day*, however, was decided before this Court's decision in *Faretta*. Since *Day*, in the context of waiver of counsel at trial, the Seventh Circuit found that although the "trial court never advised [the defendant] as to the dangers and disadvantages of self-representation, the court did give such advice to [two co-defendants] at the time when [the defendant] was present in court." *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980). While the *Trapnell* court "believe[d] that a fuller explanation of the drawbacks of self-representation should have been made by the trial court to [the defendant]," *id.* at 1029, the court found that the record established his decision to represent himself was "made intelligently and with knowledge of the dangers and disadvantages of self-representation. . . ." *Id.* at 1029.[5]

The Tenth Circuit has adopted a pragmatic approach which tailors the warnings of proceeding without counsel to the particular proceeding. *Braun v. Ward*, 190 F.3d 1181 (10th Cir. 1999), *cert. denied* 529 U.S. 1114 (2000). In

[5] Petitioner cites *United States v. Hill*, 252 F.3d 919 (7th Cir. 2001), *cert. denied* 536 U.S. 962 (2002), for the proposition that a mechanical inquiry will not always ensure a defendant's understanding. *See* Pet. Br. at 21, 31. *Hill*, however, is not wholly apposite since it involved a waiver of counsel during a trial where the defendant had standby counsel. *See Hill*, 252 F.3d at 923.

Braun, the defendant waived counsel at an evidentiary hearing to withdraw an earlier plea. *Id.* at 1187. Even in this context, the Tenth Circuit found it necessary to warn the defendant of both the seriousness of the proceeding and the specific dangers he would face if he proceeded *pro se*. *Id.* at 1187. The Tenth Circuit has not yet addressed whether this same standard would extend to waiver of counsel at a plea hearing.

Lastly, the Eleventh Circuit is also unclear about what safeguards are required to ensure a valid waiver of counsel at a plea proceeding. *See Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991), *cert. denied* 502 U.S. 835 (1991). As the Iowa Supreme Court observed, the *Stano* court "noted [only] that a defendant who pleads guilty need not be admonished of the dangers of proceeding *pro se* at trial as required by *Faretta*...." J.A. at 13. The Eleventh Circuit, however, did not clarify what admonishments were necessary. *See Stano*, 921 F.2d at 1148-1149. *See also* J.A. at 13-14 ("To simply conclude, as the State suggests, that a *Faretta*-type inquiry is not required at a guilty plea hearing does not answer the ultimate question of what colloquy is required"). *Compare United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) (in the context of evaluating a waiver of counsel at trial, the Eleventh Circuit held the "trial judge must conduct a hearing to ensure that the accused understands the dangers and disadvantages of proceeding *pro se*").

2. States

The remaining states have yet to address what type of waiver-of-counsel colloquy is necessary to protect defendants' Sixth Amendment rights in the context of a plea proceeding, although many have addressed the question in the context of trial.

a. States that require awareness of dangers and disadvantages at trial.

Ten states require that the defendant be made aware of the dangers and disadvantages of self-representation at trial,

although these states have not specified the extent of waiver necessary for proceeding *pro se* at a plea proceeding: *Briscoe v. State*, 606 A.2d 103, 107-108 (Del. 1992); *McClinton v. United States*, 817 A.2d 844, 855 (D.C. 2003), *petition for cert filed*, __ U.S.L.W. ___ (U.S. Oct. 29, 2003) (No. 03-7227); *State v. Armstrong*, 731 P.2d 249, 256 (Kan. 1987); *State v. Barrett*, 577 A.2d 1167, 1171 (Me. 1990) ; *State v. Powell*, 607 A.2d 603, 606 (N.H. 1992) ; *State v. Williams*, 663 A.2d 1378, 1388-89; *State v. Plouse*, 64 P.3d 522, 529 (N.M. Ct. App. 2003); *State v. Chapman*, 721 P.2d 392, 396 (N.M. 1986) *com-pare State v. Montler*, 509 P.2d 252 (N.M. 1973) (pre-*Faretta* waiver of counsel at plea); *Fitzgerald v. State*, 972 P.2d 1157, 1162 (Okla. Crim. App. 1998), *cert. denied* ___ U.S. ___, 123 S. Ct. 1631 (2003);[6] *State v. Hasbrouck*, 57 P.3d 209, 210 (Ore. 2002); and *State v. Arguelles*, 63 P.3d 731, 750 (Utah 2003), *petition for cert. filed*, 72 U.S.L.W. 3348 (U.S. Nov. 4, 2003) (No. 03-680).

b. States that prefer, but do not require, warning of the dangers of self-representation at trial.

Eight of the remaining states prefer, but do not require, warnings of the dangers of self-representation at trial. Alabama courts acknowledge that "[t]he case law reflects that, while a waiver hearing addressing the disadvantages of a *pro se* defense is much to be preferred, it is not absolutely necessary." *Tomlin v. State*, 601 So.2d 124, 128 (Ala. 1991) (internal citations and quotations omitted). Instead of examining the trial court's admonitions to the defendant wishing

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6 The various States' Attorneys General—as *amici*—cite *Huckabay v. Page*, 438 P.2d 645 (Okla. 1968) in their appendix for the proposition of "[u]pholding the waiver of counsel at a guilty plea when defendant was informed of his right to counsel and the possible punishment range." *See* States of Colorado, et al. Amicus Br. App. at 12a. Although decided in the context of waiver of counsel at a plea proceeding, *Huckabay* was pre-*Faretta* and has not been cited by any court post-*Faretta*.

to waive counsel at trial, Alabama uses a totality of the circumstances analysis to determine whether a defendant knowingly and voluntarily waived his right to counsel. *Tomlin*, 601 So.2d at 128-29 (outlining six factors to consider when reviewing the totality of circumstances underlying defendant's waiver of counsel).

Colorado holds that a trial judge should go through a detailed colloquy with a defendant who wishes to represent himself *pro se* at trial, including advising him of the dangers of self-representation. *People v. Arguello*, 772 P.2d 87, 95-96 (Colo. 1989); *see also Commonwealth v. Martin*, 683 N.E.2d 280, 282 (Mass. 1997).

Rhode Island has specified that that its waiver analysis is "pragmatic and directed to the particular stage of the proceeding in question." *State v. Briggs*, 787 A.2d 479, 485 (R.I. 2001). Although it has not specified the minimum requirements for waiver of counsel at a guilty plea, in the context of reviewing the waiver of a defendant who represented himself at part of his trial, Rhode Island employs a totality of the circumstances analysis where an "accused should . . . 'be made aware of the dangers and disadvantages of self-representation.'" *Id.* at 485 (quoting *Faretta*, 422 U.S. at 836). The Rhode Island Supreme Court has explained that while a *Faretta* colloquy is preferable, it is not constitutionally required. *State v. Thornton*, 800 A.2d 1016, 1025-26 (R.I. 2002) .

Similarly, in the context of waiver of counsel at trial, the state of Washington prefers, although does not require, an on-the-record colloquy to ensure that the defendant is made aware of the risks and disadvantages of self-representation. *State v. Christensen*, 698 P.2d 1069, 1072 (Wash. Ct. App. 1985).

Other state cases decided in the context of *pro se* defendants at trial, where the state courts indicate they prefer that a defendant be warned of the dangers and disadvantages of self-representation but look to the totality of the record to

decide whether the waiver can be upheld, include *Matthews v. State*, 394 So.2d 304, 309 (Miss. 1981); *Watkins v. Commonwealth*, 494 S.E.2d 859 (Va. 1998); and *Mapp v. State*, 953 P.2d 140, 143-44 (Wyo. 1998)

c. States that do not explain the minimum inquiry necessary to waive counsel at trial.

The remaining states—Georgia, Kentucky, Maryland, and North Dakota—have not explicitly delineated the minimum requirement for ensuring a knowing and valid waiver of counsel in the context of a plea proceeding. The Supreme Court of Georgia has not announced a specific minimum inquiry that would ensure a knowing, voluntary and intelligent waiver. *See Larry v. Hicks*, 491 S.E.2d 373 (Ga. 1997). Georgia, however, has unambiguously held that a guilty plea colloquy is not sufficient to establish the validity of the defendant's waiver. *Id.* at 374-375. Similarly, North Dakota requires "specific inquiries" but has not delineated what those inquiries should include. *State v. Hendrick*, 543 N.W.2d 217, 219 (N.D. 1996) (noting pre-*Boykin* standard for reviewing 1966 guilty plea in North Dakota "depend[ed] on the totality of the circumstances, not specific recitals," and that current standard requires "specific inquiries" under *Boykin v. Alabama*, 395 U.S. 238 (1969) and North Dakota Rule of Criminal Procedure 11).

Kentucky and Maryland have also not discussed the necessary requirements for an adequate waiver. In Kentucky, in a case where a *pro se* defendant at trial had standby counsel who participated from time to time, the court stated that the "conduct of appellant, as disclosed by the record, in presenting his defenses puts the lie to [the] argument [that the trial judge should have advised him of the seriousness of the charges and the advisability of being represented by counsel]," *Dunn v. Commonwealth*, 573 S.W.2d 651, 652 (Ky. 1978), but the court did not specify the minimum requirements necessary. Lastly, although courts in Maryland must

follow Maryland Rule 4-215(a) in order to ensure a knowing and intelligent waiver, *Johnson v. State*, 735 A.2d 1003, 1016 (Md. 1999), that the rule does not outline the necessary inquiry between the trial court and the defendant wishing to proceed *pro se*.

CONCLUSION

This Court should ensure that the state and federal courts adopt a uniform reading of the Sixth Amendment with respect to the right to counsel in a plea proceeding. At a minimum, *amici curiae* respectfully urge this Court to affirm the reasoning and conclusion reached by the Supreme Court of Iowa in this case.

Respectfully submitted

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APPENDIX A
Chart of Jurisdictions' Requirements to accept a waiver of counsel

Require Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance	Strongly Advise Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance	Do Not Require Waiver of Counsel at Plea Proceeding that Follows *Faretta's* Guidance
Federal Circuits: Fifth, Sixth, Eighth, Ninth and D.C.	**Federal Circuit:** Second	**Federal Circuits:** None
States: Alaska, Arkansas, Connecticut, Florida, Iowa, Missouri, New York, Ohio, Pennsylvania and Wisconsin	**States:** California, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee and Vermont	**States:** Arizona, Idaho, Illinois, Louisiana, Michigan, Montana, Nevada, South Dakota, Texas and West Virginia

Have Not Addressed Waiver of Counsel at Plea Proceeding, but Require *Faretta's* Guidance for Waiver of Counsel at Trial	Have Not Addressed Waiver of Counsel at Plea Proceeding, but Prefer *Faretta's* Guidance for Waiver of Counsel at Trial	Have Not Delineated Minimum Requirement for Waiver of Counsel at either Plea Proceeding or Trial
Federal Circuits: First, Third, Fourth, Seventh, Tenth and Eleventh	**Federal Circuits**: None	**Federal Circuits**: None
States: Delaware, District of Columbia, Kansas, Maine, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon and Utah	**States:** Alabama, Colorado, Massachu-setts, Mississippi, Rhode Island, Virginia, Washington, and Wyoming	**States:** Georgia, Kentucky, Maryland and North Dakota

Appendix B

Text of Statutes and Rules Referred to in Brief

1. Connecticut Practice Book § 961 provides: "A defendant shall be permitted to waive his right to counsel and shall be permitted to represent himself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

   (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

   (2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent himself;

   (3)Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

   (4) Has been made aware of the dangers and disadvantages of self-representation."

2. Rule 39(a) of the Alaska Rules of Criminal Rule 39(a) provides: "The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel." ALASKA R. CRIM. P. 39(a).

3. Florida Rule of Criminal Procedure 3.111(d) provides:

(d) Waiver of counsel

(1) The failure of a defendant to request appointment of counsel or the announced intention of a defendant to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.

(2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

(4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than 2 attesting witnesses. The witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of

counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

FLA. R. CRIM. P. 3.111(d).

4. Rule 121 of the Pennsylvania Rules of Criminal Procedure permits waiver only when the trial court elicits from the defendant: (1) whether the defendant understands that he has a right to be represented by counsel and the right to free counsel if he is indigent; (2) whether the defendant understands the nature of the charges against him and the elements of each of those charges; (3) whether the defendant is aware of the permissible range of sentences and/or fines for the offense charged; (4) whether the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and the counsel would be familiar with those rules; (5) whether the defendant understands that there are possible defenses to these charges to which counsel might be aware, and if these defenses are not raised they may be lost permanently, and (6) whether the defendant understands that, in addition to defenses, the defendant has other rights that, if not timely asserted, may be lost permanently and that if errors occur and are not objected to or otherwise timely raised by the defendant, the objection to these errors may be lost permanently.

5. Minnesota Rule of Criminal Procedure 5.02 provides in relevant part:

(3) Waiver of Counsel, Misdemeanor. If a defendant

appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowedge and understanding of the defendant's rights. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver. MINN.R.CRIM.P. 5.02.

6. North Carolina's 15A-1242 provides:

Defendant's election to represent himself at trial

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
(2) Understands and appreciates the consequences of this decision; and
(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. N.C.G.S. 15A-1242.

7. Maryland Rule 4-215, "Waiver of Counsel," provides in pertinent part:

a. First appearance in court without counsel. At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

(1)Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
(2) Inform the defendant of the right to counsel and of the importance of the assistance of counsel.
(3)Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory

penalties, if any.
(4)Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.
(5)If the trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
The clerk shall note compliance with this section in the file or on the docket.

(b)Express waiver of counsel. If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, that the defendant knowingly and voluntarily waived the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.